NO. 4140

United States
Circuit Court of Appeals
For the Ninth Circuit

NORWICH UNION FIRE INSURANCE SOCIETY, LIMITED, of Norwich and London, England, a Corporation,
Plaintiff in Error,

vs.

LEO BROTHERS COMPANY, a Corporation,
Defendant in Error,

and

THE NEW BRUNSWICK FIRE INSURANCE COMPANY, a Corporation,
Plaintiff in Error,

vs.

LEO BROTHERS COMPANY, a Corporation,
Defendant in Error,

Upon Writs of Error to the United States District Court of the District of Idaho, Central Division

PLAINTIFFS IN ERROR' OPENING BRIEF.

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Spokane, Wash.
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Attorneys for Plaintiff in Error.

UNION PRINTING COMPANY, SPOKANE

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STATEMENT OF THE CASE.

These were two separate actions consolidated for trial before the court without a jury. Plaintiffs in Error were defendants in the lower court and defendant in error was plaintiff in both cases and for convenience will be so designated in this brief.

Plaintiff is an Idaho corporation, engaged in the manufacture of vinegar at Moscow, Idaho, its principal place of business. Defendants are each foreign corporations, engaged in fire insurance underwriting and doing business in the State of Idaho and this litigation arises out of a disagreement as to the construction and application of two separate contracts of insurance entered into between plaintiff on the one part and the two defendants respectively, on the other.

One Fred Veatch was and had been for many years, agent for the two defendants, among other insurance companies, representing them at Moscow, Idaho, in the making of contracts of insurance. He was also at all times material here, the owner of most of the stock in and the active manager of plaintiff corporation; in fact, it is admitted that so far as the insurance was concerned, Fred Veatch was Leo Brothers. (Tr. 48, 95.) Defendants were aware of Veatch's relationship with plaintiff at the times the contracts of insurance were entered into.

Leo Brothers Company, represented by Mr. Veatch, was and had been for several years, the

owner of a plant for the manufacture of vinegar in Moscow, Idaho. Originally this plant had consisted of the main manufacturing plant, a three-story brick structure with a one-story frame addition to the north, situate in Block 102, on the southeast corner of the intersection of Main and C streets in the city of Moscow, in which building the machinery for the manufacture and storage of vinegar was located, and of a small detached frame building about thirty-five feet south of this building, abutting on Main street, containing tanks for the storage of vinegar. At a time prior to the time when the contracts here involved were entered into, plaintiff had had the one-story frame addition to the north of the main building torn down and a two-story frame addition added to the north of the brick and a large one-story frame addition added to the east. At the east end of this one-story frame addition, on its south side, was built a small canopy or shed roof, covering a scale and scale platform, resting on the north side on the frame addition and on the south side on two posts. Some time after these improvements, the small detached frame building to the south of the main building was enlarged and built up toward the north and east, bringing its north walls to within about sixteen feet of the factory building. A concrete driveway separated the two buildings. When this was done, the canopy shed was attached on its south side to this building, this being the only physical connection between the two

buildings. This was the condition of the property at the time the contracts of insurance in controversy were entered into and at the time of the fire. (Diagram, Tr. 229.)

As agent for various insurance companies, Mr. Veatch acted under well defined and restricted instructions from his principals. He was furnished with maps prepared by the Sanborn Map Company, showing the location of all insurable risks in the city of Moscow. The diagram (Tr., page 229) is a re-production of the Sanborn Map page whereon Leo Brothers Company factory and storage building are shown. Opposite the factory proper, the map maker had placed on this map the number 244, which was the city or mail delivery number, but the map maker placed no number opposite the building containing the storage tanks. Mr. Veatch, however, for reference in writing insurance, had written on the map in his office in lead pencil, the number 240, as he had figured that this would be about a correct number for this location. (Tr. 74, 99.)

All insurance risks in the city of Moscow were surveyed by experts of the Board of Fire Underwriters, an organization of Salt Lake City, Utah, of which organization defendants were members. These experts classified various buildings of the city and their contents, located and segregated the various risks or subjects of insurance and published specific rates for insurance thereon. (De-

fendants' Exhibit 19.) It also published a book of general estimates, basis rates (Defendants' Exhibit 18), for the use of agents in the field so they could write a risk which had not been specifically rated, pending authorization of specific rating by the board. (Tr. 129.) This book also contained general rules for the guidance of agents. These surveys and rates, as well as the tariff book of general estimates and values were placed in the hands of the various insurance company members of the board and their agents and constituted rules and instructions for the agents' guidance in writing insurance which could not be deviated from. (Tr. 87, 88.) When a specific rate had been published, that rate identified the particular risk or subject of insurance and the agent was not permitted to adopt or apply any other rate or deviate from this construction. (Tr. 87.) Under the rules in force, separate risks could not be insured under one sum in a policy. (Tr. 88, 130, Defs. Ex. 18), except in cases where an average clause was applicable and it is conceded that the average clause was not applicable in the present case and was not used or intended to be used. (Tr. 87.)

When block 102, wherein the plant in question was located, was surveyed, the result was furnished to Mr. Veatch and the various insurance companies he represented and made a part of the book of the specific rates of Moscow. (Def. Ex. 19 and 7.) The survey and rating of plaintiff's plant was desig-

nated as page 3 of said book and the material portion was as follows. (Defs. Ex. 7, Tr. p. 231):

Correction Sheet No. 60
April 7, 1921

MAIN STREET—EAST SIDE

Moscow, Idaho P-3

No. of Rating	Location	Class	Occupation	Bldg.	Cents	Rating Takes Effect
1	C and A. Streets—Block 102					
2	SE c C (244)	C-D	Vinegar Factory	250	250	
3	South	D	Vinegar Tanks	245	245	Oct. 15-19
4	South (224)	D	*Warehouse	340	340	April 1-20
5	South (210)	C	Office	100	100	
6	NE c A (200)	C	Dwelling	45	45	

The line numbered (1) of this sheet identifies the block. (Tr. 53.) The line numbered (2) identifies the risk known as the vinegar factory proper and by this means classifies it and fixes it as a distinct risk or subject of insurance (Tr. p. 89) and the line numbered (3) identifies and fixes the vinegar tanks and contents as a separate risk. (Tr. 53, 115.) The word "south" used as descriptive in this line (3) is the conventional term known to insurance men and understood as referring to the building or risk just south of the risk designated in the previous line and is used to designate a risk when no number is given to the building on the map in use or fixed by the municipal authorities. (Tr. 53, 115.)

Mr. Veatch as agent for defendants and other companies, was furnished by these companies with blank standard form policies and with other blanks called daily reports for use in reporting to his principals a policy when written. The rule was to prepare in triplicate a descriptive sheet, describing the

property to be insured, attach one copy of this to the policy, another copy to the agent's record and to attach the third copy to the daily report form and send the daily report with the descriptive clause attached, to the home office or general agency of the company. (Tr. 49, 50.) Upon this daily report form were appropriate blanks for reference to the proper page and line number of the specific rates and for reference to the fire maps of the risk. (Tr. 51.) The contract thus presented to the insurance companies was for a risk based upon the standard policy form and the typed description of the property, the insurance companies' copy of the Sanborn Map and of the rate sheets with reference to which the companies necessarily assumed the policies were written and the tariff book and book of rules in their hands and in the hands of their agents in conformity with which rules they of necessity assumed that the agent had written the policies.

In writing the contracts of insurance which are the subject of these suits, Mr. Veatch as principal owner and manager of plaintiff corporation had no communication whatsoever with anyone connected with defendants except such information as he conveyed to defendant companies by way of the daily reports and rate and map references. (Tr. 48.) As to the plaintiff, as was admitted, he was Leo Brothers Company and no communication was

necessary. The original policies never left his hands.

For several years prior to the date of the present contracts, Mr. Veatch had written two separate groups of insurance policies covering the vinegar plant. One group described the property covered as on the building or its contents known as number 244 on the southeast corner of Main and C streets, Moscow, Idaho, and the other group described the property insured as the building or contents (as the case may be) known as number 240 on the east side of Main street between A and C streets. This was both before and after the improvements to the property above referred to were made. These policies were reported to the various insurance companies including these defendants by daily reports and references as above described.

On December 21, 1920, Mr. Veatch prepared a policy which, omitting immaterial parts, bound the Norwich Union Fire Insurance Society, Limited, for a term of one year to insure plaintiff against loss by fire "to the following described property while located and contained as described herein and not elsewhere, to-wit" (Tr. 7):

Standard Farms Bureau Form 367 (May 1918).

MERCHANDISE AND FIXTURES FORM.

On the following described property, all situate at No. 244 on the East side of Main Street, between "A" and "C" Streets, in Moscow, Idaho.

*1	$5000.00	On merchandise of every description, consisting principally of Vinegar and Vinegar stock manufactured or in process of manufacture, and on materials for manufacturing same, including packages, labels, cases, boxes and all wrapping and packing materials, being the property of insured or sold but not removed; * * * all only while contained in the three-story comp. roof, brick & frame building and its additions (if any) of like construction communicating and in contact therewith, situate as above.

This form was attached to the daily report blank of the Norwich Union Fire Insurance Society and transmitted to its general agent. On this daily report form, Mr. Veatch further designated the risk by reference to the page and line of the book of specific rates as page (3), line (2) and also referred the company to the risk known as number 244 in block 102 on the insurance maps. (Defts. Ex. 9. Tr. 249.) On July 28, 1920, Mr. Veatch prepared a policy which, omitting immaterial parts, bound the New Brunswick Fire Insurance Company to insure plaintiff for the term of one year against loss by fire "to the following described property while located and contained as described herein and not elsewhere, to-wit:"

Standard Farms Bureau Form 367 (May 1918).

MERCHANDISE AND FIXTURES FORM.

On the following described property, all situate No. 244 on the Southeast corner of Main and "C" Streets, in Moscow, Idaho:

* $6000.00 On merchandise of every description, consisting principally of Cider Vinegar manufactured or in process of manufacture, and on materials from manufacturing same, including packages, labels, cases, boxes and all wrapping and packing materials, being the property of insured or sold but not removed; * * * all only while contained in the three-story comp. roof, brick & one-story frame building and its additions (if any) of like construction communicating and in contact therewith, situate as above.

(Tr. pp. 187-188.)

This policy was prepared in the same manner and copy of the form attached, attached to the daily report and reported to the general agent for defendant New Brunswick Fire Insurance Company at San Francisco, one W. W. Alverson. This daily report contained the same references as to map number (Defts. Ex. 10, Tr. 254), but the rate book reference apparently, from Mr. Veatch's copy introduced in evidence, was left blank, although he testified that this might have been filled in in the copy sent to the company, but if the blanks were not filled in, they should have been. The rate of 250 being the rate for the risk on line (2), page 3, of the specific rates and for the main plant, was indicated on the daily report.

At the time this policy was reported and at the time of the fire, there was insurance on the vinegar tank risk which Mr. Veatch had written, binding the United States Fire Insurance Company of which he was agent and this same Mr. Alverson, general agent, which policy he had reported to Mr. Alverson by daily report and in which policy he had insured the risk referred to as the vinegar tank shed risk and describing it as number 240 on the east side of Main street between "A" and "C" street and referred to it as the risk shown on the insurance map as number 240. (Defts. Ex. 8B, Tr. 245.)

He had also about this same time and in the same manner, written policies binding the Home Insurance Company with two policies and the Liverpool, London & Globe Insurance Company with one policy, for both of which companies he was agent, for $10,000.00 each for loss of vinegar all only while contained in the property situate at number 240 on the east side of Main Street between "A" and "C" Streets, reporting them in the same manner and referring to the risks as number 240 on the insurance map.

A fire occurred on the 6th day of July, 1921, damaging the vinegar located and contained in the risk referred to as number 240, the vinegar tank shed, to the extent of $19,561.00. The $20,000.00 insurance in the Home Insurance Company and the Liverpool, London & Globe Insurance Company ad-

mittedly covered this loss, having been specifically designated as covering the risk, but plaintiff contending that the policies of defendants also covered and should pro-rate with this insurance and with defendants contending that their policies covered only the vinegar in the main factory proper or number 244, this litigation resulted. From a decision of the District Court upholding plaintiff's contention, this Writ of Error is prosecuted.

SPECIFICATIONS OF ERROR.

There was error:

I.

In deciding that the property destroyed by fire was insured under the policies of insurance sued on in the plaintiff's complaints.

II.

In denying the defendants' motion for judgment at the close of plaintiff's case.

III.

In denying defendants' motion for judgment at the close of the entire case.

IV.

In refusing to make findings for defendants as requested at the close of the entire case.

V.

In entering judgment for plaintiff in any sum.

VI.

In deciding that there was any evidence or inference therefrom that the property destroyed was located or contained in the building described in the policies sued on as Block 102, No. 244, Sanborn Map.

VII.

In construing the agreements of the parties as contracts of insurance of the contents of the building known as "Vinegar Tank Shed" referred to as Risk 240.

VIII.

In deciding that the building, the contents of which were destroyed, was the same building or part thereof, as the building known and described as No. 244, Block 102, Sanborn Map.

IX.

In not deciding that the two buildings were separate and distinct risks and that the building and contents destroyed were not insured under the contracts of insurance sued on in plaintiff's complaint.

X.

In deciding that there was any evidence or inference therefrom that the property destroyed was located or contained in the building described in the policies sued on as Block 102, No. 244, Sanborn Map, on the S. E. corner of Main and "C" Streets, Moscow.

ARGUMENT.

The single question involved in this appeal is whether the property destroyed was covered by defendants' contracts of insurance or stated otherwise, whether the contracts of insurance insured the vinegar, the contents of the building designated as the vinegar tanks building and referred to as number 240, it being admitted that the vinegar in this building was the only vinegar destroyed. All the specifications of error go substantially to this one question and in argument must necessarily be treated as a whole.

At the outset, we wish to point out that there was absolutely no dispute as to the facts on this point, the only controversy being as to the application of the law to these facts. In fact, the entire case except as to the amount of loss on which no question is raised, is based entirely upon the testimony of plaintiff's witness, Mr. Veatch, plaintiff's manager and upon certain uncontroverted and unimpeached documentary evidence and the uncontroverted and

unimpeached expert testimony of defendants' witness Wooley, whose testimony was in the most part merely cumulative and explanatory of certain portions of Mr. Veatch's testimony and we believe that when these facts are analyzed and the proper rules of law applied, it will be seen that there is absolutely no evidence or inference therefrom to sustain the judgment of the District Court.

It seems that in approaching a discussion of the question raised, that the first point to consider is what transaction created the insurance contracts, that is, gave rise to contractual rights and duties between the parties. Bearing in mind that Mr. Veatch, although defendants' agent, was the plaintiff's manager and chief stockholder, in substance the plaintiff itself and the sole actor for plaintiff in this transaction and further that he wrote these policies without any previous authorization or communication whatsoever, it is manifest that when he wrote the policies themselves and kept them in his possession, no contract arose. The only communication that he ever had with defendants regarding this insurance was such as he conveyed to them in the daily reports (Defts. Ex. 9 and 10, Tr. 249-259) together with the rate book and map reference thereon. The contract thus presented, was accepted by the defendants, but no contract other than the one so presented was ever tendered and there was no communication or meeting of the minds other

than upon the contract with its references as thus tendered by the daily report. This being the contract and on this point we believe there can be no question, this contract must be interpreted, giving effect to all its parts which of necessity includes the rate reference, the map referenc and the rules under which the insurance was necessarily written.

There is no question here of defendants asking for any reformation of a policy or introducing evidence to vary the terms of the written contract. The contract of the parties is the contract thus created by the tender of the risk on the one hand by means of the daily report and references and the acceptance on the other and the court must of necessity resort to extrinsic evidence for the purpose of applying the contract to its subject matter. The court may also by means of extrinsic evidence, place itself in the position of the parties at the time the contract was entered into for a better understanding and interpretation of the contract.

> "Where the question is whether the property destroyed by fire is embraced within the terms of the policy, it is always competent in contracts of doubtful interpretation to give evidence of extrinsic facts which will place the court in the situation of the parties when the contract is made in order to enable it to be read understandingly."

Arlington Mfg. Co. vs. Norwich Union Fire Insurance Society, 107 Fed. 662.

In the present case, regardless of the physical aspects of the property, the evidence is clear and undisputed as we will hereafter demonstrate, that the parties had constituted the two buildings in question as two separate and distinct risks or subjects of insurance. The property destroyed was the property contained in the risk referred to as the vinegar tank shed or in the building referred to as number 240. The first point of law therefore is raised by the question of whether under the contract as entered into, the property destroyed, to-wit, the vinegar, was insured while in any other location except the location agreed upon by the parties. On this point we believe that under the standard form of policy, there can be no question. The standard form provides that the property is insured "while located and contained as described herein and not elsewhere," and the form proposed by plaintiff to defendants also provided "all only while contained in the three-story comp. roof, etc., situate as above."

Under a contract of this form there can be no recovery for property destroyed in any other place than that specified and described.

Davison v. London & Lancashire Ins. Co., 189 Pa. St. 132, 42 Atl. Rep. 2.

L'Anse v. Fire Assoc., 119 Mich. 427, 78 N.W. Rep. 465.

Benton v. Farmers' Ins. Co., 102 Mich. 281, 60 N. W. Rep. 691.

Lakings v. Phoenix Ins. Co., 94 Iowa, 476, 62 N. W. Rep. 783.

Green v. Liverpool, L. & G. Ins. Co., 91 Iowa, 615, 60 N. W. Rep. 189.

British-American Assur. Co. v. Miller, 91 Tex., 414, 44 S. W. Rep. 60.

Birnstein v. Stuyvesant Ins. Co., 83 App. Div. 436, 82 N. Y. Supp. 140.

Saunders v. Agricultural Ins. Co., 2 App. Div. 223, 37 N. Y. Supp. 769.

Bahr v. National Ins. Co., 80 Hun. 309, 29 N. Y. Supp. 1031.

Leventhal v. Home Ins. Co., 32 Misc. 685, 66 N. Y. Supp. 502.

Phoenix Ins. Co. v. Stewart, 53 Ill. App. 273.

Lyons v. Providence-Washington Ins. Co., 14 R. L. 109.

Eaton v. Phoenix Ins. Co., 15 Ky. L. R. 441.

Bryce v. Lorillard Ins. Co., 55 N. Y. 240.

Maryland Ins. Co. v. Gusdorf, 43 Md. 506.

Bradbury v. Fire Assoc., 80 Me. 396, 15 Atl. Rep 34.

Farmers' Ins. Assoc. v. Kryder, 5 Ind. App. 430.

Boyd v. Mississippi Home Ins. Co., 75 Miss. 47, 21 So. Rep. 708.

Aetna Ins. Co. v. Brannon, Tex. Civ. App., 81 S. W. Rep. 560.

Globe Fire Ins. Co. v. Moffat, 154 Fed. 13.

Steil v. Sun Ins. Co., 171 Cal. 795, 155 Pac. 72.

Bear v. Natl. Fire, 29 N. Y. S. 1031.

Turning then to the contract of the parties, the question is, in what location did the parties agree that this vinegar would be covered? If the two buildings were distinct and separate locations, by agreement of the parties it is clear that the insurance did not cover in both. Taking first the physical aspects of the property without considering any agreement or understanding of the parties as to the subject matter, we find that the vinegar tank shed, number 240 and the factory building proper, number 244, had for many years been separate and detached buildings. Some time before the contracts, the tank shed had been enlarged up to about 17 feet of the other building, being divided by a driveway and connected only by a gate at one end and by a shed covering over the scales at the other. This slight physical connection of the two buildings could hardly constitute the smaller an addition. However, this point is not material, for regardless of the physical features, the undisputed evidence by plaintiff's own admissions is that the parties agreed and considered these two structures as separate locations or risks and regarded them as distinct and separate buildings or subjects of insurance.

This is clearly the position plaintiff took when proposing the insurance to defendants and the basis

upon which defendants accepted plaintiff's proposal and the situation at the time the contract was entered into is what must control and not what one of the parties might now say he intended.

> "It can make no difference in the result what was intended by either party, nor can the contract be changed or modified by what one party may now say he intended. It all depends upon what was said and done at the time. If no contract was then made it cannot be made now post-facto.
>
> "A contract, express or implied, executed or executory, results from the concurrences of minds of two or more persons, and its legal consequences are not dependent upon the impressions or understanding of one alone of the parties to it. It is not what either thinks, but what both agree.
>
> "When the terms of an agreement are ascertained, its effect is determined by the law, and does not depend upon the uncertain or undisclosed notion or belief of either of the parties."
>
> *Roberta v. Royal Insurance Company,* 76 S. E. 865.

Assuming for the sake of argument that physically these two building were one, this fact would have no bearing upon the application of insurance to the risk if the parties themselves for insurance purposes had agreed or considered them separate risks or locations. The case of Stanton v. Rochester German Underwriters Agency, 206 Fed. 978, decided by Judge Rudkin while on the district bench,

is well in point. In that case there was but one entire building broken up into several apartments. The policy provided that the insurance should attach to each of these buildings and contents in certain proportions. The contention was made that inasmuch as there was but one building this clause could not be applied. Judge Rudkin, however, said:

> "The plain meaning of all this is that the cold storage, the lard, the smoke building, etc., described in item No. 1 are each and all separate and distinct subjects of insurance and that the amount of the policy was to be applied proportionately in event of loss. It may seem a misnomer to call these separate parts or departments of one entire plant a building; but in entering into contracts parties have a right to adopt their own nomenclature, and if the language used is plain and free from ambiguity the courts have no alternative but to enforce the contract as they find it."

Now the parties here so considered these two buildings separate and distinct locations and risks and their contents separate and distinct subjects of insurance. Written rules were promulgated to that effect and plaintiff by his own admissions interpreted these rules in that light. We have only to go to Mr. Veatch's own admissions on the stand to find that this was clearly the understanding of the parties. Mr. Veatch, after explaining the manner in which the risks were arrived at and the specific rates published and after testifying that he was bound by the construction thus adopted, referring to plaintiff's exhibit 7, testified: (Tr. 53)

"Q. Number two says, southeast corner 'C' 244, C D vinegar factory, 250—or vinegar factory, 250, 250. The first 250 refers to the rate on the building? A. Yes. sir.

Q. And the second refers to the rate on the contents? A. Yes, sir.

Q. Line 3 of this rate book says, south—what does that mean? Does that refer to the risk south of the southeast corner? A. It means next south.

Q. D vinegar tanks, building 245, contents 245. That refers to the vinegar tank risk? A. Yes, sir. (42.)

Q. And the contents? A. Yes, sir."

And again, (Tr. 76-77):

"Q. Now, you have no authority to change rates? A. Absolutely no, sir. (63.)

Q. You are bound by the rating schedules? A. Yes, sir.

Q. And I believe you testified that you had no intention or never had at any time applied the co-insurance or reduced rate average clause? A. No sir, we never have.

Q. You insured two risks specifically? A. The Home of New York and the Liverpool & London & Globe, yes, sir.

Q. And also the New Brunswick and the Norwich Union? A. That wasn't so intended but—

Q. But that is the way you wrote it? A. Yes, sir.

Q. You applied the specific rate? A. Yes. sir.

Q. Referring to your companies you noted to these companies when you applied these rates, you noted the particular reference to the particular rates? A. Yes, sir.

Q. They then would know what you were referring to? That was your only means of communicating the manner in which you applied the rates? A. Yes, sir."

And again, (Tr. 78):

"Q. And in all those policies you applied the rate on the property that you described as 240, you described the rate on line 3, page 3? A. Yes, sir.

Q. Took the rate described in the risk at line 3, page 3? A. Yes, sir, on the contents of the tanks.

Q. And on the property described as 244 you always described the rate used on line 2, page 3, of the specific rates? A. Yes, sir."

And again, still referring to this exhibit, (Tr. 114-115):

"Q. On the left-hand side all these are buildings; where that says, southeast corner 'C' Street, that means the building on the southeast corner of 'C' Street, is that not correct? A. Yes, sir.

Q. And where it says south, that means the building just south? A. Not necessarily. The building south of it is a number.

Q. But if there is no number on the Sanborn map, and there doesn't happen to be a number, they refer to it as south, and that means the building south, does it not? A. Yes."

These are all admissions of plaintiff in the record and show how clear and emphatic was the evidence and how unquestioned was the agreement or understanding of the parties that the subject of insurance designated as 244 on the southeast corner of Main and "C" streets was a separate and distinct risk or subject of insurance from the risk shown as the vinegar tank risk and designated as 240. Other admissions by Mr. Veatch clearly corroborated this. It was admitted that other policies had been written covering the vinegar tank risk as a separate risk and designated as number 240 in other companies, both as to the building and contents. While the trial court in his opinion made the observation that it was not shown that defendants knew of this other insurance and could not have been influenced thereby, this observation, though hardly accurate as will be noted, shows the misconception of the situation. The other insurance, whether known to these defendants or not, clearly demonstrated the construction that Mr. Veatch, in writing the insurance, had placed upon the rules and agreement of the parties. It showed that he knew and understood 240 to be a separate subject of insurance from 244. Moreover, it was admitted by him that one contract on the risk at the time of the fire was with the United States Fire Insurance Company, that W. W. Alverson was the general agent of this company and was also the general agent of the defendant New Brunswick Fire In-

surance Company and that he had reported both risks to Mr. Alverson. The risk tendered for the United States Fire Insurance Company was for insurance on the building and contents known as 240 Main Street and described in line 3, page 3 of the specific rates, while the risk tendered to defendant New Brunswick Fire Insurance Company was the risk known as 244 on the southeast corner of Main and "C" street and described on line 2, page 3, of the specific rates of Moscow. It being thus shown and without a doubt and without a scintilla of evidence to the contrary that the parties regarded 244 and its contents as separate and distinct from 240 or the vinegar tank risk, the situation in reference to the entering into the contract is as though Mr. Veatch, when tendering his daily reports had said, "There are two risks in Leo Brothers plant; the one designated on line 2, page 3 of the specific rates of Moscow and known as number 244 on the southeast corner of Main and "C" street and the other designated on line (3) page 3 of the specific rates of Moscow and known as the risk just south of 244. This policy covers the risk designated on line (2) page 3." Had the communication been couched in this form, there could be no possible doubt that the present policies did not cover the contents of the vinegar tank shed or risk designated on line 3, page 3, as stated above and in view of this evidence, this is the only construction that can be placed upon the communication.

The contention first made by plaintiff in the presentation of its case was that he understood that the words "additions communicating or in contact therewith," enabled him to claim that policies covering the contents of 244 extended over and covered the vinegar tank risk. Such a position, of course, is not tenable. If, as demonstrated above, these buildings were separate and distinct risks or subject of insurance by agreement, neither could be an addition to the other. Moreover, in view of the admissions by Mr. Veatch that a specific classification and rate identified the specific risk, neither was part of the other. This position unquestionably had no merit, as is well illustrated by the following questions propounded by the court to Mr. Veatch and his answers: (Tr. 112-113)

> "THE COURT: I don't believe either one of you quite understand the question in my mind. When you send in a report of a policy on 244, how is the company to know what that policy, even though it carries the rate $2.50, which you have suggested, how is the company to know that it extends to this shed and the contents of this shed?
>
> A. The form of the policy reads, 'and its additions, communicating or in contact therewith.'
>
> THE COURT: Isn't that true also of the 240 policy?
>
> A. Yes, sir. The only way they could get at that would be by reference to their rate book. That says, 'line 3, tank sheds.'

THE COURT: Then, if the rate is the criterion, a rate of $2.45 in one case and a rate of $2.50 in the other, and a policy—two policies come in, with the same description, one carrying $2.45 and one $2.50, why wouldn't they naturally conclude that one is limited to the property on the corner and the other is limited to the property to the south?

A. I can't—I don't know."

Moreover, as is shown by the elementary rule cited from the case of Roberta v. Royal Insurance Company, supra, it was incompetent for Mr. Veatch to say what he intended or understood in his own mind the coverage to be. It was not what he had in his own mind, but what he did and communicated to the other party, to-wit, the defendants, that counted, and what he did and communicated is demonstrated by the following testimony: (Tr. 77)

"Q. You insured two risks specifically?

A. The Home of New York and the Liverpool & London & Globe, yes, sir.

Q. And also the New Brunswick and the Norwich Union?

A. That wasn't so intended but—

Q. But that is the way you wrote it?

A. Yes, sir.

Q. You applied the specific rate?

A. Yes, sir.

It is apparent, however, that this position was abandoned and plaintiff's final position taken that

the policies insuring the contents of 244 were blanket policies covering not only 244 but extending over and covering the contents of 240 also and it was upon this point that in our opinion, the District Court made the prime error in reasoning that resulted finally in his erroneous decision. In the first place, by the clear language of the contracts proposed, the insurance was specifically limited to the vinegar only while located and contained in 244 and not elsewhere and when it was admitted that 240 or the vinegar tanks was not 244, but was separate and distinct from it, this language clearly limits the insurance to the property while in 244 and at no other time or in no other place, and manifestly where the contract thus limited the insurance to the property while contained only in a specifi place, a blanket coverage covering at some other place or places could not be inferred.

The testimony is clear and undisputed that the rules under which the parties operated, prohibited the writing of insurance under a blanket policy covering under one sum separate or distinct risks or items of hazard without the use of a co-insurance or reduced rate average clause and Mr. Veatch testified that the average clause was not applicable to these risks, had never been used and that he had not intended its use here. Mr. Veatch's testimony makes it very clear that the rules he operated under, forbid the blanket coverage which the Trial

Court seemed to find as the real reason for his decision. Mr. Veatch says: (Tr. 87-88)

"Q. You are familiar with the rule for applying co-insurance reduced rate average clause?

A. Yes, sir.

Q. And you testified that that was never contemplated, or had never been applied in this risk?

A. No, sir, never.

Q. Now, taking into consideration all those things, and your experience of many years as an insurance man, do you know of any way in which the vinegar tank shed, taking into consideration that rating schedule, and the factory building, 244, could have been written under one coverage in a policy?

A. I think so, under the printed forms that the boards put out.

Q. And following those instructions, do you know of any way that you could arrive at the two risks under one coverage, and still adhere to the instructions and the rates? I believe you testified on the former trial that there was none, (74) did you not?

A. That there was what?

Q. That you knew of no way except by the reduced rate average?

A. Yes, the reduced rate average.

Q. That is the only way that they could be covered under one coverage?

A. If they were two buildings that would be true, yes."

And again referring to the same subject, (Tr. 91 and 92):

> "Q. Then, Mr. Veatch, let me read this from your testimony in the former trial. I said: 'And where there is a rate fixed for a certain risk, that applies to the entire risk?' 'I think that is correct. I think there are some exceptions to that rule.' 'You are referring to the average clause, but you have never used the average clause in writing this particular kind of risk?' 'No, sir.' 'The average clause has no bearing on this particular kind of case?' 'No, sir.' 'You identify to your principals the particular insurance you desire, or that you are binding with them, as a single particular risk in all cases? In other words, you never write two separate risks at separate rates, in one policy?' 'No, sir.' 'That cannot be done, according to your rules or the rules of your principals?' 'I don't think so. I have never done it, anyhow, or attempted to do it.' That was your testimony in the former trial, was it not?
>
> A. Yes, sir, and that is still correct.
>
> Q. That was your belief at that time, and that is your belief now?
>
> A. It is my belief now, yes, sir."

And later when his counsel had switched to this position of blanket coverage, he says: (Tr. 114)

> "Q. Mr. Veatch, you have these rate books, which are your only instructions. Will you find in there any place that authorizes the writing of blanket coverage where there are two specific rates given by the rating bureau?
>
> A. I don't think I could in any limited time. I don't know whether I could at all.

Q. You are not familiar with any such rules as authorize that, anyway? (98)

A. No, sir."

Defendants' witness Wooley (Tr. 130) amply corroborates this testimony of Mr. Veatch, testifying positively that such blanket coverage was prohibited, citing the rule referred to in the District Court's opinion which reads as follows:

> "A blanket policy, covering under one sum separate or distinct risks or items of hazard, is hereby prohibited except as follows: Policies covering under one sum merchandise contained in frame, brick, or stone warehouses, elevators, canneries, packing houses or wineries and on their adjoining platforms, or in cars alongside or within 300 feet thereof, shall be considered as complying with the above rule requiring different items of hazard to be specifically insured."

As noted above, it was in construing this rule and the testimony relative thereto that the trial court overlooked the important and uncontradicted testimony of the interpretations the parties themselves had put upon the rule and by the simple process of transposing a portion of the rule, adopted an interpretation that led him into his erroneous conclusion, notwithstanding the fact that by the clear language of the contracts used, limiting the insurance to a specific risk, it would have made no difference whether such a rule was in existence or not. However, the rule itself is clear. Such a blanket policy

as the trial court made for the parties in place of the contract they themselves had adopted, was absolutely prohibited by any possible construction of the rule and this rule was one with which both parties were familiar. Nor is there anything in the exceptions to the rule quoted above which operated against the construction the parties themselves put upon it. This exception merely states that insurance in one sum may be granted upon merchandise in one of the classes of buildings mentioned and upon the platforms or cars alongside of said building, without infringing upon the rule. For this specific class of property, the rule merely makes the building and its platform and cars one risk. The language could not be clearer. A transposition of a word which caused the trial court to adopt the conclusion was as follows: The rule prohibits a blanket policy covering under one sum separate or distinct risks or items of hazard. The Court in construing the rule says, "Physically, the vinegar was not necessarily made up of distinct lots or items." That might well be true, but the rule prohibits a coverage under one sum, separate or distinct risks and not lots. The risk, as the parties knew, was not in the vinegar, but in its location. To follow the trial court's reasoning to its logical conclusion, plaintiff might well have had another building situated several miles away and yet, if in his process of manufacture, he transferred the vinegar from one building to another, the insurance would

still follow and cover it, notwithstanding the fact that the policy limited the insurance to cover only while contained in the specific place.

Plaintiff invoked and the trial court seemed to find some materiality in the following rules found in defendants' exhibit 18, Book of Tariffs and General Instructions:

> "No. 3. BRICK AND FRAME BUILDINGS.
>
> "When insuring a B or C class building, which has a frame addition (below the roof) specify a separate amount on such addition and its contents; charging on the B or C class portion and contents, the proper B or C class rate. Such frame addition (when occupied by the same person or firm) need not be considered as an exposure to the main building according to the 'Tables of Exposures.' Unless such specifications are made, charge the D class rate on the whole risk.
>
> "No. 5. FRAME BUILDINGS WITH COMPARTMENTS.
>
> "Each compartment for occupancy on the ground floor, of a D class building having more than one such compartment shall be rated as a separate building, if provided with a separate entrance from the street. A D class building, however, having two or more such ground floor compartments, may be insured in a single sum, at the rate of the highest rated compartment of such building. This highest rate shall also be the rate for all the contents contained in two or more compartments of the building above the ground floor, when such contents are in-

sured in a single sum. A lumber, wood or coal yard shall be classed as a D class building, and all the rules applying to a D class building apply also to a lumber, wood or coal yard."

As explained by the expert who introduced this exhibit 18, the portion wherein these rules were found was a book of general estimates, basis rates for the use of agents in the field, so that they could write a risk pending the authorization of a specific rate by the Board, but as admitted by Mr. Veatch and uncontroverted, when a rate had been published by the Board, no agent could make his own rate or adopt any other. (Tr. 129.) However, these rules, even without this testimony, have no materiality. A reading of the rules will demonstrate this. Rule 3 not only does not authorize a blanket coverage, but on the contrary, calls for a specification of a separate amount on the main building and on the addition and its contents. Rule 5 provides for the rating of compartment buildings, D class, of which class the Leo buildings did not belong. The buildings in the instant case were already rated and their class fixed. The utmost immateriality of these two rules in considering the present case, is again demonstrated when it is called to mind that these contracts did not undertake to insure under the blanket coverage, but on the contrary insured the vinegar while contained as described therein, to-wit, in 244 and not elsewhere.

To sum up the entire case, it can be said that the uncontroverted evidence shows that the two buildings denominated respectively 244 and 240, were separate locations and distinct risks or subjects of insurance; that both parties in contracting for the insurance had this in mind and that the risk presented and accepted by defendants was the risk designated as 244 on the southeast corner of Main and "C" street, Moscow, Idaho, and the risk that was damaged by fire was the risk known as 240 Main Street and that therefore, the property insured by defendants was not the property destroyed and that there is absolutely no testimony or inference therefrom to warrant any other conclusion.

Respectfully submitted,

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